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September 9, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

**Re: Federal-State Joint Board on Universal Service,
CC Docket No. 96-45**

Dear Ms. Salas:

On behalf of Western Wireless Corp., I am writing to inform you that Gene DeJordy, Executive Director, Federal Regulatory, Western Wireless Corp., and my colleague Michele Farquhar and I made *ex parte* presentations yesterday and today regarding the proceeding referred to above. Yesterday, we met with: (1) Mark Schneider, Senior Legal Advisor to Commissioner Ness; (2) Rosalind Allen of the Office of Plans and Policy; and (3) Steven Weingarten, Chief, Commercial Wireless Division, Wireless Telecommunications Bureau (CWD/WTB); Jeffrey Steinberg, Deputy Chief, CWD/WTB; and David Krech of CWD/WTB. We met today with: (4) Chris Wright, General Counsel, and James Carr and Lisa Gelb of the Office of General Counsel; and (5) Lisa Zaina, Deputy Chief, Common Carrier Bureau ("CCB"); Katherine Schroder, Counsel to the Chief, CCB; Charles Keller, Deputy Chief, Accounting Policy Division ("APD"), CCB; and Richard Smith of APD/CCB.

These presentations covered the issues summarized in the attached documents, which were handed out during the meetings. If you have any questions, please contact me.

Respectfully submitted,



David L. Sieradzki
Counsel for Western Wireless Corp.

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Magalie Roman Salas

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Enclosures

ccs: Mark Schneider
Rosalind Allen
Steven Weingarten
Jeffrey Steinberg
David Krech
Chris Wright
James Carr
Lisa Gelb
Lisa Zaina
Katherine Schroder
Charles Keller
Richard Smith

Western Wireless Presentation on Pending Universal Service Issues

- General: Need to ensure portable universal service program and opportunities for new entrants to become designated as universal service providers
- ETC Designation Process
 1. Status of WW's 13 state applications: SD, WY denied; others pending
 2. State process under section 214(e)(2) must be fixed
 - *WW South Dakota preemption petition* -- seeking FCC preemption of SD PUC approach, which poses barrier to entry by requiring carriers to provide ubiquitous service *before* they can receive ETC designation
 - *Fifth Circuit decision follow-up options* -- in response to reversal of FCC decision that Section 214(e) itself precluded states from establishing additional ETC criteria, the FCC could:
 - (1) seek *certiorari*, and/or
 - (2) propose to adopt rules to guide state designation of ETCs, under Section 201 of the Act and *Iowa Utilities Board*
 3. FCC must expeditiously designate carriers under 214(e)(6)
 - *WW Section 214(e)(6) Petition for Crow Reservation, Montana* – filed August 4, 1999; issue also raised in *Tribal Universal Service FNPRM*
 - *Wyoming decision follow-up options* – Wyoming PSC dismissed WW's ETC petition based on its lack of jurisdiction over CMRS carriers, and encouraged WW to file a Section 214(e)(6) petition with the FCC
- Federal and State Universal Service Funding
 1. Background on WW's efforts, including Rural Task Force membership, universal service proceeding comments, NARUC/Joint Board presentations
 2. Federal universal service funding issues
 - Service areas – small areas (wire centers) enable competitive entry
 - Local usage – setting any minimum would deter wireless entrants
 - Timing of funding – fix "quirk" that delays funds to new entrants
 - Wireless cost model – use the lower of wireline or wireless costs
 3. State universal service funding issues
 - *WW Kansas preemption petition* – seeking preemption of a state program that guarantees greater funding to ILECs than to new entrants

Supreme Court Review of the Holding In The Fifth Circuit Universal Service Decision That States May Impose Additional Criteria for ETC Designation Under § 214(e)(2)

- The FCC should seek Supreme Court review of the Fifth Circuit ruling that States, in considering requests for Eligible Telecommunications Carrier (“ETC”) designation, may impose criteria not found in § 214(e).
- ***The Fifth Circuit Decision on ETC Designation Was Wrong On the Merits.*** The Fifth Circuit’s ruling on this point was wrong, and the FCC’s decision that the statute bars States from imposing additional criteria should have been upheld, for the following reasons:
 - The court’s ruling would allow a State to deny ETC status to an applicant who satisfies § 214(e)(1) but fails one or more State requirements. But § 214(e)(2) clearly says that a State *shall* designate a carrier if it satisfies (e)(1). As a matter of logic, a State would violate this provision if it denies ETC status to an applicant who meets the (e)(1) requirements, but not additional State-imposed requirements.
 - To the extent that the statute is ambiguous, the court violated the *Chevron* principle requiring deference to agency interpretations of ambiguous statutes by imposing its own interpretation rather than allowing the FCC to interpret its organic statute.
- ***The Fifth Circuit Ruling on ETC Criteria Raises Critical Policy Issues.*** The ETC designation process is critically important to facilitate competitive entry and create a competitive federal universal service program in which all carriers can participate regardless of the technology used.
 - Uniform ETC requirements are imperative so that all carriers, regardless of the technology used or the geographic scope of their operations, can readily qualify as ETCs to participate in the federal universal service program.
 - Allowing States indiscriminately to impose additional ETC criteria will unnecessarily delay the ETC process and impede entry by non-incumbents in rural/high-cost areas, contrary to the federal universal service program contemplated by the Act. Potential new entrants may forego competing for residential customers in rural areas because of the uncertainty and arbitrariness surrounding the ETC process and requirements.
 - Based on Western Wireless’ experience, several State commissions have already demonstrated a willingness to deny ETC status to certain classes of carriers, such as CMRS. The Fifth Circuit holding is likely to embolden States to deny ETC requests by creating new criteria and determining that they are not met.
 - For these reasons, correcting the court’s decision is also imperative for ensuring that wireless-wireline competition takes root not just in urban/suburban areas, but in all areas.

- ***The FCC Should Provide Further Guidance on the ETC Process.*** For the reasons given above, the FCC should consider adopting rules to guide the State ETC designation process.
 - The Fifth Circuit specifically declined to address the argument that the FCC exceeded its jurisdictional authority to interfere with the States’ regulation of “intrastate” service.
 - The Supreme Court, in *Iowa Utilities Board*, held that Section 201(b) explicitly gives the FCC authority to make rules governing matters to which the 1996 Act applies, even matters that the 1996 Act directs States to implement, such as interconnection arbitration under Section 252. The same rationale should apply to FCC rulemaking regarding State designation of ETCs under Section 214(e).
 - This jurisdictional analysis applies with greater force here. In *Iowa Utilities Board*, the Eighth Circuit characterized Section 252 as applying to *intrastate* matters, and the Supreme Court accepted this characterization. By contrast, the Fifth Circuit held that the federal universal service program is essentially *interstate*.